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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE R. MEDRANO, Defendant and Appellant.	B231272 (Los Angeles County Super. Ct. No. TA111746)
In re JOSE R. MEDRANO, on Habeas Corpus.	B238609

APPEAL from a judgment of the Superior Court of Los Angeles County, Joan Eleanor J. Hunter, Judge. Affirmed as modified.

PETITION for Writ of Habeas Corpus. Writ denied.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Jose R. Medrano, appeals the judgment entered following his conviction for first degree murder, assault with a firearm and making criminal threats, with firearm use enhancements (Pen. Code, §§ 187, 245, 422, 12022.5, 12022.53).[1] He was sentenced to state prison for a term of 63 years to life.

The judgment is affirmed as modified. The petition for writ of habeas corpus is denied.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

On April 10, 2010, defendant Medrano's mother and father were having a barbeque party at their house in Compton. Medrano lived with his parents. Among those attending the party were Medrano's girlfriend Emiliana, his brothers Rafael and Guadalupe, his sisters Francisca and Gessie, and Francisca's husband Ricardo Alcarez.

At one point during the party, Medrano and Francisca argued because Francisca had criticized him while talking to Emiliana. Medrano called Francisca a "fucking bitch" and said, "Watch it, bitch. I'm coming back." He said this as he was walking Emiliana to her car.

When Medrano returned, he and Francisca continued to argue. Medrano said he was going to burn down both his parents' house and Francisca's house. Gessie testified that when Francisca threatened to call the police, Medrano "said that he was not going to be in jail just for nothing, like saying that he was going to do something" like "[k]ill someone." Francisca called the police and then went into the house to get away from Medrano.

Francisca walked into the kitchen where Gessie was washing dishes. Medrano came in. He was still angry and he told Francisca, "I'm going to kill you bitch, watch." Then he pushed Gessie and reached toward a cabinet underneath the sink. Gessie saw

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Medrano open the cabinet, pull out a gun and point it at Francisca, who screamed and crouched on the floor behind the kitchen island. Francisca was screaming, "Ma, ma, he's going to kill me." Medrano kept saying, "I'm going to get you. I'm going to get you." Ricardo, Rafael and Guadalupe rushed into the kitchen because they heard Francisca screaming. Ricardo said something like "Oh, hell, no. You're fucking crazy. She's my . . . wife . . . ," and punched Medrano in the head. Medrano said to Ricardo, "Move, mother fucker, or I'm going to kill you too." A few seconds later, Medrano shot him.

Rafael testified he was the first one to get to the kitchen when they heard Francisca scream. Then Ricardo brushed past him and said, "Hell, no," and punched Medrano in the face. Rafael grabbed Ricardo and pushed him aside while Guadalupe grabbed Medrano. Medrano pointed a gun at Ricardo and said, "I'm going to shoot you." Rafael let go of Ricardo and tried to stop Medrano, but before he could reach him, Medrano shot Ricardo. Rafael grabbed Medrano after the gun went off and tried unsuccessfully to wrest the gun away from him. Medrano ran from the house.

At about 5:40 p.m., less than 20 minutes after the shooting, Sheriff Deputy Christopher Carpenter spotted Medrano running down the street about four blocks from the shooting scene. Carpenter detained Medrano, who seemed nervous but did not appear to be intoxicated.

Ricardo died from a single bullet wound to the chest.

Francisca and Gessie testified no one at the party was drinking. When Detective Robert Harris spoke to Medrano about nine hours after the shooting, he did not appear to be under the influence of alcohol or drugs.

2. *Defense evidence*.

Guadalupe testified Medrano retrieved the gun from a kitchen cabinet near the sink *after* Ricardo punched him. Rafael immediately grabbed Medrano from behind and tried to get the gun away from him. As Rafael struggled with Medrano the gun went off accidentally, hitting Ricardo:

"A. Rafael was grabbing [Medrano], and they . . . were struggling back and forth, and [Medrano] had his hand, his finger on the trigger, and at some point Rafael lift [*sic*] him up, and the shot went off.

"Q. Okay. Did you actually see the gun go off?

"A. Yes.

"Q. And when the gun went off, Rafael's arms were still around [Medrano's]?

"A. Yes. Because he was trying to take the gun away from him."

Guadalupe testified he did not know whether Medrano had been drinking that day.

Medrano testified in his own defense. On the afternoon of the barbeque he had two friends visiting him at his parents' house. The three of them were drinking beer and Medrano had also taken two Vicodin pills someone had given him. When one of the two friends left to buy some medical marijuana, he left his gun with Medrano because he wasn't allowed to take a gun into the marijuana shop. Medrano put the gun into his waistband. This was at about 4:00 p.m.

Emiliana called Medrano into the house and said she was going to leave; she was upset about something Francisca had said to her. Medrano walked Emiliana to her car. When he returned, he started arguing with Francisca. She made insulting remarks, which angered Medrano. Francisca said she was calling the police and told him to leave, but he refused because he lived there.

After Francisca called the police, Medrano realized he could go to jail for having the gun because he had previously been convicted of aggravated assault, so he went into the house in order to put the gun in a drawer. But when he took out the gun to put it away, Francisca started screaming. Medrano put the gun back into his waistband and told her: "I'm not going to fucking kill you or anything. You're fucking tripping." Just then Rafael, Guadalupe and Ricardo ran into the kitchen. Without saying anything, Ricardo punched Medrano in the face. Medrano stumbled backward and pulled out the gun, but he didn't point it at Ricardo. They argued: "[H]e told me I was tripping or something like that. And I'm, like . . . [¶] . . . 'I wasn't gonna kill nobody. You're tripping. I was

going to put the gun away.' " But then Rafael grabbed Medrano and the gun went off accidentally.

Medrano testified he had not intended to shoot Ricardo, that he did not recall having threatened anyone, and that he never told Ricardo, "Move, mother fucker, or I'm going to shoot you, too." Rafael was wrong when he testified about grabbing for the gun *after* it went off. In fact, Rafael "grabbed the gun before it went off." Medrano testified he could remember all these details about what happened despite the alcohol and Vicodin he had consumed:

"Q. You do remember the struggle when Rafael was trying to get the gun; is that correct?

"A. Yes.

"Q. You do remember that you did not try to kill anyone; is that correct?

"A. Yes.

"Q. You do remember that the gun accidentally went off; is that correct?

"A. Yes."

3. *Rebuttal evidence.*

Officer Q. Rodriguez testified that, when she interviewed Medrano in the early morning hours of April 11, he did not say his friend had given him the gun, that he had been trying to put it away in the kitchen, or that it had gone off accidentally. Medrano did not say he had taken Vicodin and he did not appear to be under the influence of alcohol.

CONTENTIONS

1. There was insufficient evidence to sustain a first degree murder conviction.

2. The trial court erred by refusing to grant a midtrial continuance so Medrano could retain an expert witness.

3. There was ineffective assistance of counsel.

4. Medrano was impermissibly subjected to multiple punishment in violation of section 654.

DISCUSSION

1. *There was sufficient evidence of first degree murder.*

Medrano contends his first degree murder conviction must be reduced to second degree because there was insufficient evidence of premeditation and deliberation. This claim is meritless.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must

accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

People v. Anderson (1968) 70 Cal.2d 15, 26-27, discussed the following types of premeditation and deliberation evidence: "The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing – what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [Citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2). [¶] Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)."

The *Anderson* factors do not establish normative rules, but instead provide guidelines for a reviewing court's analysis. (*People v. Sanchez* (1995) 12 Cal.4th 1, 32, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Thus, the *Anderson* factors are not a sine qua non to finding deliberation and premeditation, nor are they exclusive. (*Ibid*; *People v. Davis* (1995) 10 Cal.4th 463, 511 [*Anderson* factors are descriptive, not normative]; *People v. Raley* (1992) 2 Cal.4th 870, 886 [when evidence of all three *Anderson* factors is not present, appellate courts look for

either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing].)

b. *Discussion*.

Medrano asserts there was insufficient evidence of premeditation and deliberation because the evidence demonstrated "no preconceived design, no 'weighing of considerations,' and no real motive," but rather showed that he "acted impulsively and the shooting was unplanned." However, the speed with which these events unfolded did not prevent Medrano from reaching the requisite state of mind. " 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . . " [Citations.]' " (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

The Attorney General argues: "Appellant had threatened to kill someone during an argument with Francisca. Later, appellant pointed a gun at Francisca and threatened to kill her. When Ricardo heard Francisca screaming, he came to her aid. Ricardo scolded appellant for threatening his sister and punched appellant in the face. In response, appellant . . . pointed the gun at Ricardo and told him to move or he would shoot him. Appellant then shot Ricardo. [¶] The above evidence showed that appellant had planned to kill someone even before Ricardo confronted him. It is also significant that the shooting occurred very shortly after Ricardo punched appellant. These facts indicated, and the jury reasonably concluded, that Ricardo's murder resulted from preexisting thought and reflection, rather than a rash or unconsidered impulse."

We agree with this analysis. Medrano argued with Francisca, announced he was going to kill her, and grabbed a loaded gun. Had Medrano shot Francisca at that point, premeditation and deliberation would have been established. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1289 ["Evidence that Cummings was in possession of a handgun and had threatened to kill any policeman who got in his way went to his motive for shooting Officer Verna and thus to the elements of intent, premeditation and deliberation"]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 757 ["A defendant's threat

against the victim . . . is relevant to prove intent in a prosecution for murder"]; *People v. Cartier* (1960) 54 Cal.2d 300, 311 ["Evidence tending to establish prior quarrels between a defendant and decedent and the making of threats by the former is properly admitted and is competent to show the motive and state of mind of the defendant"].) That Francisca's husband intervened to protect her and that Medrano's attention quickly shifted to him as the intended victim would not alter this analysis even if Medrano had simply shot Ricardo without saying a word.[2] As it happened, Medrano did say something more: he announced he was going to shoot Ricardo and then he did so.

There was ample evidence of premeditation and deliberation to sustain the verdict of first degree murder.

2. *Trial court properly refused continuance request.*

Medrano contends the trial court erred by denying his midtrial request for a continuance in order to engage an expert witness. This claim is meritless.

a. *Legal principles.*

" ' "The granting or denial of a motion for continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. . . ." ' [Citation.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1105-1106.) "A continuance will be granted for good cause (§ 1050, subd. (e)), and the trial court has broad discretion to grant or deny the request. [Citations.] In determining whether a denial was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons presented for the request. [Citations.]"

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[2] For example, in *People v. Salas* (1972) 7 Cal.3d 812, the defendant brandished a gun while robbing a bar and threatened to kill the victims if they got off the floor. Then, while fleeing from this robbery, the defendant killed a deputy sheriff. *Salas* held the jury "could reasonably have inferred that defendant from the beginning planned to kill anyone interfering with the successful perpetration of the robbery and could reasonably conclude that defendant killed [the deputy] in accordance with that plan . . . ." (*Id*. at pp. 824-825.)

(*People v. Frye* (1998) 18 Cal.4th 894, 1012-1013, disapproved on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.)

On appeal, the trial court's ruling is reviewed for abuse of discretion. (*People v. Mickey* (1991) 54 Cal.3d 612, 660; see *People v. Howard* (1992) 1 Cal.4th 1132, 1171-1172 [defendant must show witness is material and likely to give non-cumulative testimony beneficial to the defense].) And even an abuse of discretion can be harmless error. (See *People v. Hawkins* (1995) 10 Cal.4th 920, 945, disapproved on another ground in *People v. Lasko* (2000) 23 Cal.4th 101, 109-110 ["Nor is defendant able to demonstrate that, had the one-week continuance been granted, there is a reasonable probability that the outcome of the trial would have been more favorable to him"].)

b. *Discussion*.

Right after Medrano testified, defense counsel told the trial court: "I got some information just yesterday about the testimony about the Vicodin and the alcohol. I think I need to appoint an expert." The trial court refused to grant a continuance for this purpose, ruling it was untimely: "We're not prolonging this case. If you want to go ahead and try to get an expert and have them in here by this afternoon, you can go ahead and do that, but . . . this case has been pending for some time. You announced ready." The defense rested without calling an expert.

Medrano argues the trial court had no legitimate reason for denying a continuance in this situation. He is wrong. "A showing of good cause [for a continuance] requires a demonstration that counsel *and the defendant* have prepared for trial with due diligence." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037, italics added.) As Medrano's appellate brief implicitly concedes, the untimeliness of this continuance request was entirely his own fault. His opening brief asserts: "After [Medrano testified he had been drinking beer and also taking Vicodin], defense counsel told the court that this was the first he heard about appellant's consumption of drugs in tandem with alcohol on the day of the shooting. Based on appellant's testimony, counsel asked the court to appoint an expert to testify for the defense on how the use of drugs and alcohol would affect appellant's

ability to form the specific intent required for the charged crimes. Since appellant had never before told counsel he had taken two Vicodin pills, counsel could [not] have requested the appointment of an expert at any earlier point in time." Hence, Medrano himself was the cause of the untimely continuance request.

Moreover, the continuance motion could have been properly denied on the separate ground that Medrano would not have derived any substantial benefit from consulting an expert. (See *People v. Doolin, supra*, 45 Cal.4th at p. 451 [motion for continuance properly denied where "[r]etesting DNA would not have been beneficial to defendant . . . in light of the extensive evidence linking him to each crime"]; *People v. Gatlin* (1989) 209 Cal.App.3d 31, 40 [speculative nature of proposed new evidence properly justified denial of continuance].) As will be discussed, *post*, there was no evidence Medrano's state of mind during the shooting incident had been affected by drug or alcohol intoxication.

We conclude the trial court did not abuse its discretion by denying the continuance motion.

3. *There was no ineffective assistance of counsel.*

As an alternative to his claim the trial court erroneously denied his request for a continuance, Medrano contends[3] his trial counsel rendered ineffective assistance by failing to make a pretrial request for appointment of an intoxication expert. This claim is meritless.

a. *Legal principles.*

A claim of ineffective assistance of counsel has two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that

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[3] This contention is raised in both Medrano's brief on appeal and in his accompanying habeas corpus petition.

counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] [¶] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness. [Citation.] To establish prejudice he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391.) "[T]he burden of proof that the defendant must meet in order to establish his entitlement to relief on an ineffective-assistance claim is preponderance of the evidence." (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

"[I]f the record sheds no light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation for counsel's performance. [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) An appellate court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.)

"Where the record shows that the omission or error resulted from an informed tactical choice within the range of reasonable competence, we have held that the conviction should be affirmed." (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1215; see *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 [decision whether to put on witnesses is "matter[ ] of trial tactics and strategy which a reviewing court generally may not second-guess"].) "[T]he choice of which, and how many, of potential witnesses [to call] is precisely the type of choice which should not be subject to review by an appellate court." (*People v. Floyd* (1970) 1 Cal.3d 694, 709, disapproved on other grounds by *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36.) "It is not sufficient to allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively. [Citations.] [¶] Rather, the defendant must affirmatively show that the

omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics." (*Floyd*, at p. 709.)

b. *Discussion*.

The basis for Medrano's claim trial counsel ignored a viable intoxication defense is a pretrial psychological report that was triggered when defense counsel declared a doubt as to Medrano's competence to stand trial.

Medrano provides the following summary of the resulting competency report: "Dr. Ronette Goodwin-Matthews filed a report, which disclosed that appellant had a 'history of substance abuse that included "everything" except heroin,' namely, 'alcohol, PCP, pills, ecstasy, crack cocaine and methamphetamine.' Appellant attended a drug program, briefly and unsuccessfully, and persisted in his 'desire to use drugs.' In fact, appellant expressed a desire to enter a plea just 'so I can go home and smoke,' yet, appellant manifested no real understanding about what plea bargaining meant or entailed. Dr. Goodwin-Matthews determined that appellant had an IQ of 77, scored in the 'extremely low range' in reasoning and verbal abilities, and his 'appreciation of [the charges pending against him] was questionable. [¶] The psychologist concluded that it was 'likely that Mr. Medrano's overall intellectual functioning is that of low intelligence based upon his poor academic history and history of drug use which tends to impair cognitive functioning.' Thus, 'the issue of whether Mr. Medrano is mildly mentally retarded cannot be concluded' and 'of whether Mr. Medrano is competent to proceed with trial also remains elusive.' Yet, given 'the absence of a psychotic mental disorder or severe depression or cognitive impairment, the default finding of competence must be made."

Medrano argues this report "should have put counsel on immediate notice of the fact that appellant had a mental defense available," and that the report established he had been "*using [intoxicating] substances on the day of the shooting* because the doctor's report indicated [he] was a chronic drug and alcohol user."

But these claims are based on a serious misreading of the record.

First, trial counsel appears to have had a perfectly reasonable tactical justification for not raising an intoxication defense. In his statement,[4] trial counsel explained: "In the psychologist's report, it was reported that Mr. Medrano did not present as suffering from any memory loss. Mr. Medrano informed me that he remembered details of the events leading up to the struggle, the struggle, and after the struggle, and that he wanted to testify. Furthermore, the report states that, 'Although it's likely that Mr. Medrano's overall intellectual functioning is that of low intelligence based upon his poor academic history and history of drug use which tends to impair cognitive functioning, the issue of whether Mr. Medrano is mildly mentally retarded cannot be concluded.' [¶] In light of the above, I did not believe that an intoxication expert on the issue of alcohol alone would have been beneficial. *Based on Mr. Medrano's proposed testimony – that he remembered clearly what had happened, that the gun accidentally went off*, I believed an alcohol defense would not have been effective and would turn the jurors off to him." (Italics added.) Moreover, Medrano's trial testimony was backed up by his brother Guadalupe, who also testified the gun went off accidentally while Rafael was struggling with Medrano and trying to disarm him.

Second, our review of the record confirms there was no evidentiary basis for an intoxication defense. Section 22, subdivision (b), provides: "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." However, a defendant is not entitled to an intoxication instruction merely because there is evidence he or she *used* an intoxicating substance: "A defendant is entitled to [a voluntary intoxication] instruction only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' " (*People v. Williams* (1997) 16 Cal.4th 635, 677; see *People v. Seaton*

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[4] Trial counsel's statement is contained in an email response elicited by Medrano's appellate counsel, and is attached an as exhibit to Medrano's habeas corpus petition.

(2001) 26 Cal.4th 598, 666 [defense counsel's failure to request intoxication instruction could not have been prejudicial because, although defendant smoked cocaine and drank gin, beer and wine, the evidence "did not strongly suggest [these substances] prevented him from forming the intent to commit" the charged crimes]; *People v. Williams, supra,* at p. 678 [intoxication instruction unwarranted because "no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent"]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1181 [intoxication instruction unwarranted where no evidence that defendant's beer drinking "had any noticeable effect on his mental state or actions"].)

Here, not one witness testified Medrano appeared to be intoxicated on the day of the shooting.[5] The police officer who apprehended him 20 minutes after the shooting testified Medrano did not appear to be intoxicated. When he testified, Medrano did not say he had been intoxicated, and said he clearly remembered everything that had happened during the incident. What was missing here was *any evidence* Medrano had actually been impaired by the two Vicodin pills and the unknown quantity of beer he drank. This evidentiary gap is not cured by the psychologist's conclusion Medrano was a chronic drug user. "Evidence of 'gross intoxication' . . . is not a prerequisite to the giving of [intoxication] instructions; [but] what is required is evidence from which a reasonable jury could conclude defendant's mental capacity was so reduced or impaired as to negate the required criminal intent." (*People v. Marshall* (1996) 13 Cal.4th 799, 848.) As the trial court pointed out: "[Medrano] never said he was under the influence of anything. So as the evidence stands, *there's no evidence of intoxication*."[6] (Italics added.)

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[5] Medrano asserts he "consumed copious amounts of drugs and alcohol," which he also refers to as "a massive amount of intoxicants." In fact, however, there was almost no evidence regarding the actual quantity of intoxicants he consumed. Medrano testified he swallowed two Vicodin pills, but said nothing about the dosage. As for the alcohol, Rafael testified he saw Medrano and his friends in the garage with two 40-ounce beer bottles, but he did not "know if [the two bottles] were [Medrano's] or his friends' " and he could not recall if the bottles were full or empty. Medrano himself merely testified he had been drinking beer without specifying how much he consumed.

[6] Despite this conclusion, the trial court decided to give the jury a voluntary intoxication instruction "out of an abundance of caution," saying the prosecutor could

Third, Medrano's description of the competency report completely ignores the fact it cautions that Medrano appears to be malingering. According to the report, the psychologist administered a TOMM[7] test, "a widely used instrument that is sensitive to individuals with neurological impairment as well as those who may be malingering. The TOMM was used to assess the extent to which Mr. Medrano may be presenting with a response style of malingering for the purposes of secondary gain." Based on Medrano's score on this test, the psychologist concluded he was "presenting with an exaggerated response style of malingering and *the following test results contained in this battery should be interpreted with caution*." (Italics added.) The "following test results" included cognitive ability, verbal comprehension, perceptual reasoning, and processing speed. The report then said: "Testing results indicate that Mr. Medrano is functioning within the borderline range for intelligence. However, the validity of results is tenuous given Mr. Medrano's overall uncooperative style and possible malingering presentation."

In sum, we conclude Medrano has failed to demonstrate he was denied the effective assistance of counsel.

4. *Improper multiple punishment must be corrected*.

Medrano contends the trial court erred by punishing him separately for both making criminal threats (count 3) and assault with a firearm (count 2) because, under section 654, they were both part of a single transaction. The Attorney General properly concedes the error.

Section 654, the prohibition against multiple punishment, provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one

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argue there was no evidence Medrano was intoxicated. Medrano claims trial counsel was ineffective, however, for failing to notice the trial court subsequently forgot to read this instruction to the jury. However, as the evidence did not warrant giving an intoxication instruction, there was no ineffective assistance of counsel in this regard.

[7] TOMM stands for "Test of Memory and Malingering."

provision." " 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.] 'We must "view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" [Citation.]' " (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313.) This rule applies whether or not the trial court made express factual findings. (See *People v. Osband* (1996) 13 Cal.4th 622, 730 [trial court's implicit determination that defendant had more than one objective was supported by substantial evidence]; *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585 [trial court's finding, whether explicit or implicit, may not be reversed if supported by substantial evidence].)

Medrano argues the evidence clearly showed he "intended both his threat and the display of the firearm to frighten Francisca as pay back for . . . insulting him." The prosecutor essentially affirmed the correctness of this argument by telling the jury: Medrano "said, 'I'm going to kill you.' Did he mean it? Yes. He wasn't laughing. And not only was he not laughing, he was holding a loaded gun when he said it. So he intended for her to take it as a threat." At sentencing, the trial court told Medrano: "You got mad at your sister for her telling you to get a job. So the way you chose to conduct yourself was to get a gun and go in and threaten her with a loaded firearm." Implicit in this statement was a finding Medrano had only a single objective in committing both armed assault and making a criminal threat.

Hence, the sentence on count 2 should have been stayed under section 654 rather than imposed concurrently with count 3. We will order this error corrected.

DISPOSITION

The judgment is affirmed as modified. The petition for writ of habeas corpus is denied. The sentence on count 2 is ordered to be stayed. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.